In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 711

THE BURKE–PARSONS–BOWLBY CORPORATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three judge district court (J.S. 1a–2a) dismissing appellants' suit to set aside the certificate and order of the Interstate Commerce Commission (J.S. 20a–21a) permitting the Baltimore & Ohio Railroad (B&O) Company to abandon its 32 mile Ravenswood, Spencer and Greenville (RS&G) branch in West Vir-

ginia. Appellants are the West Virginia Public Service Commission and several companies doing business in the area served by the branch.

On January 11, 1964, the B&O filed an application for a certificate authorizing the abandonment of the RS&G line. Upon the protests of various parties, including appellants, full hearings were held on the application. The hearing examiner recommended that the application be denied (J.S. 22a–33a). The Finance Review Board of the Commission declined to follow the hearing examiner's recommendation. The board found that (1) the RS&G branch had been operated at a loss to the railroad during the years 1962 and 1963 (J.S. 17a), (2) extensive repairs, costing not less than $800,000, would be immediately necessary to rehabilitate the branch if it were to continue in use (*ibid.*), (3) it is improbable that traffic will sufficiently increase to offset the cost of maintaining the branch at safe minimum maintenance standards (J.S. 18a), (4) the additional $800,000 expense for rehabilitation of the branch could not be recovered (*ibid.*), and (5) there is adequate motor carrier service to meet the needs of shippers in the area (*ibid.*). The Board concluded that continued operation of the line would impose an undue and unnecessary burden upon the applicant railroad and upon interstate commerce and that the present and future public convenience and necessity permit abandonment of the line (*ibid.*).[1]

[1] Since the Board stated: "[W]e find that the present and future public convenience and necessity permit abandonment" (J.S. 18a), it is impossible to understand appellants' argument that "[t]he report of the Review Board does not even contain the quasi-jurisdictional finding that the future public convenience and necessity permit abandonment." (J.S. 8)

Petitions for reconsideration were denied by Division 3 of the Commission acting as an Appellate Division (J.S. 8a–9a).

Upon review, the court below found the Commission's decision based upon adequate findings supported by substantial evidence (J.S. 2a–8a). A stay of the Commission's order has been continued in effect pending the outcome of this appeal (J.S. 1a–2a).

ARGUMENT

The decision below is correct, and this appeal does not present a substantial question warranting plenary review by this Court.

Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18), provides that no railroad carrier subject to the Act can abandon a line unless it obtains from the Commission "a certificate that the present or future public convenience and necessity permit of such abandonment." In determining whether to issue such a certificate, the Commission must consider and balance the interests involved. *Colorado* v. *United States*, 271 U.S. 153, 169. The only question raised here[2] is whether the Commission adequately considered the prospects for increased traffic over the RS&G line. It is clear that the Commission did so.

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[2] We do not understand appellants to question the Commission's denial of their petition for reconsideration and further hearing in light of the intervening passage of the Appalachian Regional Development Act (see J.S. 7); but, in any event, it is clear that the Commission has broad discretion in passing upon such petitions. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 534–535, and *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514–515.

Having found that a minimum expense of $800,000 would be necessary to rehabilitate the RS&G branch, the Commission reasoned that the applicant railroad should not be compelled to assume this heavy burden "unless potential traffic could be assured to the full extent visualized by the protestants" (J.S. 17a). The Commission then found that the projected increased traffic from both old and new customers would not substantially reduce the losses that would be sustained in maintaining the branch at safe minimum-maintenance standards, much less permit the B&O to recoup the expenses which would have to be incurred for the necessary rehabilitation of the branch (J.S. 18a). See *Purcell* v. *United States*, 315 U.S. 381. The Commission noted that the "speculative nature of the evidence with respect to future traffic detracts from its probatory effect" and that motor carrier competition made substantial increases in traffic unlikely (J.S. 18a). The Commission also found that motor carrier service in the area is adequate to meet the needs of the area shippers (*ibid.*).

In weighing the prospects for future traffic against the costs of continued service and the availability of truck service, it was not necessary for the Commission to determine the probable future traffic "with mathematical exactness." Cf. *Transit Commission* v. *United States*, 284 U.S. 360, 370. Having weighed "all factors carefully" the Commission properly concluded that continued operation of the branch would impose an unnecessary burden upon the applicant railroad and upon interstate commerce, and, thus, the present and future public convenience and necessity permitted

abandonment of the branch (J.S. 18a). See *Colorado* v. *United States, supra,* at 168.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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